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JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. 485

RAYMOND P. WARD, *Petitioner*

v.

ATLANTIC COAST LINE RAILROAD CO.,
Respondent

BRIEF FOR RESPONDENT

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INTRODUCTION

Writ of Certiorari was granted 19 October 1959 herein on the petition of RAYMOND P. WARD, to a judgment entered 12 March 1959 by the United States Court of Appeals for the Fifth Circuit which had therein affirmed a jury verdict and judgment entered thereon against WARD, as PLAINTIFF in an action prosecuted by him in the United States District Court for the Northern District of Florida under the Federal Employers' Liability Act to recover for injuries suffered while he allegedly was acting in the course of his employment as an employee of ATLANTIC COAST LINE RAILROAD COMPANY.

For convenience, the parties hereinafter will be referred to as PETITIONER and RESPONDENT, the Statute involved

as "FELA", and references herein to the printed transcript of the record will be made by the symbol "R".

RESTATEMENT OF THE QUESTIONS PRESENTED

Petitioner's brief frames two questions as controlling and decisive in this Court's consideration of the issues made by his petition. Respondent submits that neither of the "Questions" as framed appear to state a proper premise under those facts in this case which appear material to the actual proposition of law which Petitioner seeks to have the Court apply.

Under the proposition of law asserted by "Question 1", Petitioner seeks to have the Court extend the doctrine of "non-delegable duty" to the maintenance of private sidetracks. In stating the premise for the application of this doctrine, under the circumstances peculiar to the private sidetrack in this case, Petitioner fails to take into account certain material facts, undisputed in the case, which require the following restatement of the proposition asserted:

QUESTION I.

WHETHER THE MAINTENANCE OF A PRIVATE SIDETRACK, CONNECTED WITH THE RESPONDENT'S MAIN LINE AND USED IN INTERSTATE COMMERCE IS SO ESSENTIAL TO RESPONDENT'S "OPERATIONAL ACTIVITIES" THAT THE "FELA" IMPOSES A "NON-DELEGABLE DUTY" ON RESPONDENT TO PERFORM THIS MAINTENANCE, WHERE SUCH PRIVATE SIDETRACK WAS INSTALLED ON PRIVATE PROPERTY AT THE REQUEST AND FOR THE CONVENIENCE OF A SHIPPER WHO OWNED THE LAND ON WHICH IT WAS INSTALLED, PAID THE ENTIRE COST OF AND OWNED THE INSTAL-

LATION, HAD EXCLUSIVE CONTROL OF ITS USE AND MAINTENANCE SUBJECT ONLY TO INSPECTION BY RESPONDENT FOR SAFETY, AND WHICH WAS IN ADDITION TO THE REGULAR SIDETRACK LOADING FACILITIES PROVIDED BY THE RAILROAD FOR THE USE OF OTHER LOCAL SHIPPERS, WHO *WITH THE OWNER'S CONSENT* OCCASIONALLY USED THE PRIVATE SIDETRACK FOR LOADING PURPOSES.

Petitioner's "Question II" relates to whether the jury was properly instructed by the Trial Court on the issue of employment. In framing this question, Petitioner has exercised a rather novel license by assuming as an essential part of his premise the very proposition of law put in issue by his "Question I"; that is, under the circumstances peculiar to this case, that the law does impose a "non-delegable duty" on Respondent to maintain the private sidetrack on which Petitioner was working when injured, as the basis for his contention that the jury should have been charged according to the employment instructions requested by Petitioner, but rejected by the Trial Court.

If the premise of "non-delegable duty" as assumed in Petitioner's "Question II", is determined by the Court to be the law of this case, then it becomes decisive under "Question I" and the issue Petitioner seeks to raise by "Question II", as framed, becomes moot; Otherwise, Petitioner's "Question II", as framed, includes an erroneous assumption of law.

The premise stated in "Question II" also fails to take into account material evidence adduced at the trial on the issue of employment, as well as the basis on which the Trial Court actually charged the jury on that evidence, all of which compel the following restatement of the proposition asserted:

QUESTION II.

WHETHER PETITIONER WAS PREJUDICED BY THE TRIAL COURT'S REFUSAL TO GIVE HIS REQUESTED INSTRUCTIONS ON THE ISSUE OF EMPLOYMENT, WHERE THE INSTRUCTION GIVEN BY THE TRIAL COURT SUBMITTED THIS ISSUE TO THE JURY ON THE BASIS THAT RESPONDENT HAD TO PROVE THAT PETITIONER HAD VOLUNTARILY AGREED TO ACCEPT OTHER EMPLOYMENT ON HIS DAY OFF TO MAKE EXTRA MONEY BY REPAIRING A PRIVATELY OWNED SIDETRACK, THAT PETITIONER KNEW THE SIDETRACK WAS OWNED BY A THIRD PARTY WHO WAS TO PAY HIM FOR HIS WORK, AND THAT IN THIS UNDERTAKING HE WAS TOLD BEFOREHAND THAT HE WOULD BE WORKING FOR THE OWNER OF THE SIDETRACK, AND NOT FOR RESPONDENT.

COUNTER-STATEMENT OF THE CASE

Lower Court Proceedings: Respondent accepts the statements made in the corresponding subdivision of Petitioner's brief relating the procedural history of this case, albeit being somewhat at a loss to find justification for the irrelevant comment set forth at footnote 1 thereof referring to the "change of venue" ruling made by the Court of Appeal's judgment under attack, since that ruling has not been put in issue by the petition.

Two further observations are pertinent to certain other statements made in this subdivision of Petitioner's brief.

First, it is again apparent that in spelling out the Two Points therein asserted as being presented by his petition, Petitioner's brief fails to establish any legal or factual basis for assuming that the doctrine of "non-delegable duty" is applicable to the maintenance of the McKenzie siding.

Second, Respondent is compelled to point to the inaccuracy of the statement made at page 6 of Petitioner's brief, that the Trial Court "submitted the case to the jury solely on the theory that what the foreman told the gang absolutely governed their relationship", for even a casual reading of the record and the Trial Court's employment instruction under attack, will readily disclose that neither the instruction as given, nor the uncontroverted evidence in the record material to that issue support the statement made.

Statement of Facts: While the statement of the facts contained in this subdivision of Petitioner's brief is accepted as being in the main substantially correct, Respondent must again point to the inaccuracy of the statement made at page 13 where the erroneous assertion made at page 6 thereof is again repeated, to the effect that the Trial Court submitted the employment issue to the jury "on the simple basis that Petitioner's employment status depended entirely upon what his foreman had told him, regardless of who controlled and supervised the work" — this statement is neither supported by the Trial Court's charge nor the material evidence on this issue in the record.

Certain facts relating to the issue of employment are emphasized here to reestablish the context in which the record discloses that these facts, as well as the Trial Court's instruction thereon, were presented for consideration by the jury.

The evidence is not in dispute that Petitioner was injured while he and the other members of Respondent's Chiefland section crew, on their regular Saturday "day off", were making repairs to a sidetrack owned by the M & M Turpentine Company, which connects with the Respondent's main line near Chiefland, Levy County, Florida, locally known and here referred to as the McKenzie siding, and that the members of

the section crew were all paid by the owner of the private sidetrack for this work.

While it was stipulated that the McKenzie siding was used in interstate commerce, it was uncontroverted that the Turpentine Company owned and had exclusive control of the use and maintenance of the siding, and that the occasional use by other local shippers was only by permission from the Turpentine Company. (R 64)

In testifying that he regularly inspected the McKenzie siding in the discharge of his normal railroad duties, Section Foreman Keen further stated without contradiction, that on finding that the siding needed repairs he so informed Mr. McKenzie, the president of M & M Turpentine Company (R 69, 70); that he and his section crew, including Petitioner, had on other occasions made repairs to the siding at McKenzie's request (R 69), who personally made the arrangements (R 66) and paid for the work when it was completed (R 66, 67); that McKenzie was present at the beginning of the work on the Saturday in question, pointed out the work to be done, and furnished the ties that were to be used in making the repairs (R 63, 64, 75); that he and his crew were always paid in cash by McKenzie for this work, rather than by the usual Coast Line check, and that McKenzie had the right to start and stop this work by the section crew (R 76, 77); that private transportation was used to get to the private work, whereas, a motor car was always used to get to and from the Respondent's work (R 70, 71); that no person connected with Respondent directed him to repair the siding. (R. 76)

The pivotal issue on which the jury found Respondent "not guilty" was whether Petitioner in fact actually knew, at the time of the injury complained of, that he was working for the Turpentine Company and not for the Respondent,

and had voluntarily agreed to do so. This being so, it was apparent that under the existing FELA decisions, Petitioner had no alternative but to deny these facts if his claim was to qualify under the statute. So it was that the only testimony given by the section crew which Petitioner contradicted, were their several statements to the effect that Petitioner on Friday had agreed with the other members of the section crew to repair the McKenzie siding on Saturday, in order to make some extra money; that none of the crew was required by the Respondent to do this work (R 56, 69, 73); and that prior to reporting for work on the McKenzie siding on the Saturday in question, the section crew, including Petitioner, were told by Foreman Keen that they would not be working for Respondent, but would be working for the Turpentine Company, and to be careful because Respondent would not be responsible for their safety (R 68-70, 195, 117).

Petitioner's denial of this testimony presented the jury with an irreconcilable conflict in the evidence on this issue, and it was on this conflict that the case was submitted to the jury by the Trial Court, based on the instruction hereafter set forth which made a clear-cut question of witness credibility for the jury to decide in arriving at a finding on this issue.

At page 13 of his brief, Petitioner has cited out of context a portion of the Trial Court's employment instruction, which Petitioner says was prejudicial; the record discloses that in context, the complete instruction, as well as the Trial Court's further explanatory instruction given to the jury after Petitioner's counsel objected to the first instruction, present a picture totally different from the impression suggested by the citation in Petitioner's brief, as to how the jury was charged on the issue of employment.

Because it is essential to an evaluation of whether or not the Trial Court's employment instruction was prejudicial to

Petitioner, the specific instruction, as given, as well as the remarks of counsel in connection therewith are here set forth in full (R 145-146, 151-153):

"In this case it has been stipulated in the record that the particular track being repaired on the morning when this accident occurred was a private track, not a track belonging to the Railroad, but was a private track, and you have heard the amount of conflicting testimony here as to whether or not this plaintiff knew that fact. But it is important for you to keep in mind that this was a private track and that it was the fact that the work was being done on this private track that raises the question as to whether or not plaintiff was in the course of his employment for the defendant at the time of the accident.

"Now, if the defendant Railroad, acting through its foreman, leased or hired its employees including plaintiff Ward to another employer without the plaintiff's knowledge or consent in the change of relationship, the defendant Railroad was not thereby replaced as the plaintiff's employer and was not thereby relieved from liability for injuries sustained by the plaintiff in the course of his employment.

"Now that is a legal phrase expressing the question and I think I can use other language that maybe can help you understand it better.

"The issue in this case is whether or not Ward was aware of the fact that he was not working for the Railroad, but was working for the owner of that private track when he went to work that morning. You can understand that if his foreman ordered him back to report for work on Saturday morning without explaining to him what he was going to do, or where he had to work, and he did report back and his foreman carried him off without letting him know any of the facts about what he was doing, the foreman as the Railroad employee and agent would make the Railroad Company liable for that act, even if the work was performed on a private

track. The evidence on that point is in conflict. All the Railroad employees testified that they all knew, including Ward, that that was a private job that they were going to perform that morning for the sake of making some extra money. Ward denies that. Ward says that nobody told him that he was going to work on a private track and that he wasn't working for the Railroad Company on that day. So that creates the issue that you have to decide on this question as to whether or not Ward was an employee of the Railroad on that occasion. The Railroad is liable, as I have told you, if the fact he was working on that private track was not disclosed to him and he was not afforded an opportunity to decline to work for a third party."

MR. RUTLEDGE: (Petitioner's Counsel) Your Honor, plaintiff objects to the Charge concerning the employment issue. It was my understanding you charged the issue was whether Ray Ward was told and instructed this was a private track. Now it is the plaintiff's contention that it must have been explained to Ward, or he must have understood before he was hurt, that he was working for a third party, not for the Railroad. The question was whether this was done before Ray Ward was hurt. The mere fact that Ward was told or knew the track was privately owned - - -

THE COURT: You are right about that if I said it that way.

MR. DELL: (Respondent's Counsel) I don't think you did, Your Honor.

MR. FAIRCLOTH: (Petitioner's Counsel) I think you said it that way.

THE COURT: Do you have the charge?

MR. RUTLEDGE: (Petitioner's Counsel) I have the note, that is the way I wrote it out. It is not very legible, but that is the way I wrote it out.

THE COURT: Bring the jury back.

(Jury in the box)

THE COURT: Members of the Jury, there is some confusion among counsel as to what I charged you with reference to the plaintiff's knowledge of what he was doing on the day he was injured and I called you back without taking the time to see specifically what I said, but to recharge you on that point.

I attempted to tell you that the Railroad Company was liable to this man for his injury, if he received an injury that day on that track, and there was any negligence in connection with the performance of his work. That the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad, but working on a private track to make some extra money. I think I put it just about that simply, didn't I, to make some extra money. I told you that if the foreman failed to make that disclosure to him; ordered him to go out there and go to work, and put him to work on that private track, the Railroad Company would be liable. I don't see how I can say it any plainer. Do you have a word you think I could use to make it any plainer?

MR. RUTLEDGE: (Petitioner's Counsel) Your Honor, to make it clear he was working for some third person and not working for the Railroad.

THE COURT: Yes sir, that is the word I believe he suggested—that he was working for some third person. The foreman had to make it clear to him that he was working for some third person and not the Railroad. I thought I said it, but I guess I didn't spell it out as much as he wanted, but I want to make that clear to you. If you find from this evidence he was so advised before he went out there to work, and he went out on his own volition and joined the others to make some extra money, then he was not an employee of the Railroad Company and they would not be liable. So you approach this case and consider that question first, and if you decide that case in favor of the Railroad, you will return a verdict for the Railroad and you don't have

to worry about all the other problems. You will retire and consider your verdict."

SUMMARY OF ARGUMENT

The real issue raised by the petition herein does not involve the Trial Court's instructions in this case, but rather relates entirely to Petitioner's contention that his employment status at the time he was injured is to be determined as a matter of law, on the theory that notwithstanding the circumstances under which the McKenzie siding was installed for the Turpentine Company, the maintenance of the McKenzie siding constituted a "non-delegable duty", the responsibility for which could not be assumed by the owner.

No decisions of any Federal or State Court have been found, nor are any cited in Petitioner's brief which hold that the doctrine of "non-delegable duty" should be applied to the maintenance of a purely private sidetrack. Rather, the decisions in this field have uniformly applied the test that the doctrine becomes applicable *only* when the evidence demonstrates that the function being performed by an injured employee was "essential to", or a "necessary incident" of a Railroad's operation, without which it could not properly operate. It is readily observable within the Railroad industry that sidetrack loading facilities are nearly everywhere provided by Railroads for the use of local shippers in rural areas, and that the installation of a private sidetrack in such areas is mainly for the convenience and accommodation of a single shipper who pays for, owns, and controls the use of such sidetrack, and in consideration of this service agrees to maintain it according to accepted railroad standards of inspection necessary to protect railroad equipment and personal furnishing this service. The evidence discloses that this circumstance is true of the private sidetrack in this case. It is only logical, therefore, that the maintenance of this siding,

and other such private sidetracks, where the use or non-use can have no practical effect on a railroad's overall function or operation, should not impose a "non-delegable" duty for maintenance on the Railroad furnishing such service to a shipper-owner.

Petitioner further contends that the Turpentine Company, in contracting to assume the maintenance of the McKenzie siding, became an agent of Respondent within the intendment of the FELA, thereby making Respondent liable to Petitioner for any injury he might have suffered while working thereon. Here again, as a part of and in support of this contention, the assumption is asserted that the maintenance of the McKenzie siding was a "non-delegable duty," which assumption is not warranted by the facts in this case nor supported by the rationale of the decisions cited in Petitioner's brief.

Finally, without regard for the material evidence in the record to the contrary, Petitioner, in contending that the Trial Court failed to properly charge the jury on the issue of employment, asserts as a premise for his contention the unwarranted assumption that Respondent had a "non-delegable duty" to maintain the McKenzie siding. An examination of the Trial Court's instructions relating to Petitioner's employment status at the time of his injury will disclose, as the Court of Appeals found, that there is no merit to this contention. Under the instruction given by the Trial Court, all circumstantial evidence relating to Petitioner's employment status at the time of his injury was resolved in Petitioner's favor, *and the case was submitted to the jury on the sole issue of whether or not Petitioner had in fact voluntarily agreed on his day off to accept other employment offered by the Turpentine Company to repair the siding,* in the course of which he was injured.

If there was error in the Trial Court's instruction to the jury on the issue of employment, the error was in Petitioner's favor, because under that instruction the jury was charged that the Respondent was liable unless Petitioner *knew* he was not working for the Respondent that morning, which put on Respondent the burden of proving that Petitioner was told and understood beforehand, that in repairing the McKenzie siding he would not be working for his regular "employer", the Atlantic Coast Line Railroad Company.

ARGUMENT

According to the decisions of the Federal Courts construing the FELA, a Railroad's liability under the statute for injuries suffered by an employee, exists only when there is employment at the time of the injury.[1] By the word "employment," as used in the statute, Congress has been held to have intended to describe the conventional relation of employer an employee, that is, connoting a contract or a rendering of service for compensation.[2]

The courts have further held that "when" employment exists raises a question of law, the basic test for which is whether the function being performed by the employee at the time he is injured was a necessary operational activity of the Railroad, without which it could not properly func-

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(1) Robinson v. Baltimore & O. R. R., 237 U. S. 84, 59 L. ed. 849, 35 S. Ct. 491 (1915).
Chicago, Rock Island & Pac. Ry. v. Bond, 240 U. S. 449, 60 L. ed. 735, 36 S. Ct. 403 (1916).
Dougall v. Spokane, P. & S. Ry. Co., 207 F. 2d 843 (CA9, 1953), cert. denied, 347 U. S. 904, 98 L. ed. 1063, 74 S. Ct. 429.

(2) Robinson v. Baltimore & O. R. R., supra Note 1.
Dougall v. Spokane, P. & S. Ry. Co., supra Note 1.

tion;[3] and that "for whom" work is being performed is held to raise a question of fact for the jury.[4]

POINT I.

NO NON-DELEGABLE DUTY FOR MAINTENANCE OF PRIVATE SIDETRACKS.

The evidence in the record discloses that the McKenzie siding was on private property owned by the Turpentine Company, which had exclusive control of the use and maintenance of the siding; that Petitioner knew this; that Petitioner and the section crew were paid by the Turpentine Company, which had the right to start and stop the work; that Respondent had no legal obligation for maintenance; and that no person connected with Respondent directed that the siding be repaired. On these facts, Petitioner has attempted to establish that the Court of Appeals' judgment in this case conflicts with and should be controlled by the rationale of this Court's decision in the Sinkler [5] and Baker [6] cases, and the decision of the Sixth Circuit Court of Appeals in the Margue[7] case.

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[3] Sinkler v. Missouri-Pacific R. R. Co., 356 U. S. 326, 2 L. ed. 2d 799, 78 S. Ct., 758 (1958).
Baker v. Texas & Pacific Ry. Co., 359 U. S. 227, 79 S. Ct. 664, 3 L. ed. 2d 756 (1959).
Erie Ry. Co. v. Margue, 23 F. 2d 664 (CA6, 1928).

[4] Dougall v. Spokane, P. & S. Ry. Co., supra Note 1.
Shaw v. Monessen S. W. Ry. Co., 200 F. 2d 841 (CA 3, 1953).

[5] Sinkler v. Missouri-Pacific Railroad Company (1958), 356 U. S. 326.

[6] Baker v. Texas and Pacific Railway Co., (1959), 359 U. S. 227.

[7] Erie R. Co. v. Margue (CA 6, 1928), 23 F. 2d 664.

It becomes readily apparent from the decisions in the Margue and Baker cases, and the related cases therein cited, that all of these cases can be distinguished, for it appears from the pertinent facts that each have two factual elements in common as the basis for the rationale of the several Courts decisions, which are not present in this case, that is:

(1) in each case the *Railroad* had hired the independent contractor involved; and

(2) in each case the *Railroad* had delegated to the independent contractor hired, the performance of a function which was "essential" to or a "necessary incident" of the Railroad's operation, without which the Railroad could not properly function.

In the Margue case, the Railroad hired a construction company to maintain the Railroad's tracks, roadways and structures, using its own employees with the Railroad furnishing certain tools, train equipment and services, in the course of which one of the Railroad's trains struck an employee of the construction company. In finding for the construction company's employee, the Sixth Circuit Court of Appeals held that the maintenance of the Railroad's main line "was essential to the exercise of its franchise rights," the responsibility for which the Railroad could not avoid under the FELA. The Court recognized, however, *that there might be special services* which the Railroad itself was not legally bound to perform, and that such special services properly could be delegated to a third party without the Railroad becoming liable to the third party's employees injured in the course of such work.

In the Baker case, the Railroad had employed a construction company to strengthen and stabilize its main line right-of-way, in the course of which an employee of the construction company was struck by one of the Railroad's trains. The only issue on review was whether the case should have been

submitted to the jury on the question of employment; and all this Court held in granting the Petition was that the employee had shown facts sufficient to raise a jury issue, which should have been submitted to the jury under appropriate instructions.

The facts in the Baker case show that the Railroad "hired an independent contractor" and by contract "delegated an essential function" of strengthening and stabilizing the Railroad's main line right-of-way. Since the only issue in the Baker case was "denial of trial by jury," and considering that the factual elements involved in both the Margue and Baker cases are not present in this case, these cases are not in point and do not support the Petition.

OWNER OF PRIVATE SIDETRACK NOT RESPONDENT'S AGENT

Petitioner relies on the Sinkler case to establish, by inverse analogy, that in assuming the maintenance of its own sidetrack the Turpentine Company, for which Petitioner had voluntarily agreed to work, became "an agent" of Respondent within the broad interpretation given the word "agency" under the FELA, and that therefore in some fashion Respondent became liable to Petitioner for the injuries which he suffered while working for the Turpentine Company.

The sole issue before this Court in the Sinkler case was whether the Terminal Company which injured an employee of the Railroad, was "an agent of the Railroad" within the meaning of the FELA. The rationale of the majority opinion finding that such "agency" did exist, was based on the fact that "switching it a vital operational activity of railroading:"

> "We therefore hold that when a railroad employee's injury is caused in whole or in part by the fault of others

performing, under contract, *operational activities of the employer,* such others are 'agents' of the employer within the meaning of Section 1 of the F.E.L.A."
(emphasis supplied)

In attempting to establish an analogy with the Sinkler case Petitioner has either overlooked or ignored the basic factual dissimilarity:

In the Sinkler case, the switching work being performed by the Terminal Company was, by its nature, a "vital operational activity" of that Railroad.

In this case the maintenance of the McKenzie siding can hardly in reason or logic be deemed to be "vital" to Respondent's operations.

Since the decision in the Sinkler case was based on an independent contractor performing a "vital operational activity" for the Railroad, this decision is not relevant under the facts peculiar to this case, and does not support the petition. If the analogy is carried to its logical conclusion, it would appear that had the Turpentine Company hired non-Railroad labor to repair the McKenzie siding, such persons should be held to be working as Railroad employees for the purpose of imposing liability under the FELA, notwithstanding that in this situation Respondent would have no knowledge of such employment nor the opportunity or right to exercise any control over such "quasi-employees."

Such reasoning produces an absurdity. Neither analogy is sufficient on the facts peculiar to this case to establish an "employer-employee" relation within the accepted definition and intended application of this term under the FELA decisions.

NO SCHEME OR DEVICE SHOWN

It is further charged that the whole factual circumstance under which the section crew undertook from time to time

to repair private sidings on their "days off," in order to make extra money, was nothing more than a "scheme or device" on the part of Respondent to avoid its rightful burden and responsibility under the FELA for injuries suffered by such employees while performing this type of work. It is a little difficult to believe that either Petitioner or his Counsel have any real conscientous conviction that the officials of the Railroad Company conceived and put into effect any such "scheme or device" as suggested at page 29 of Petitioner's brief, and therefore conclude that this charge is merely the result of zealous advocacy on the part of Counsel.

It is further asserted that the alleged "scheme or device" is established by the circumstantial evidence that the railroad foreman used his regular section crew, "working them under his control and supervision, using railroad tools, paying the men off at their railroad rate of pay," and "telling them all the time that they were not working for the Railroad and the Railroad would not be responsible if they got hurt." In stating these circumstances, Petitioner's brief makes no effort to reconcile the other material uncontroverted evidence that Respondent had no legal duty to maintain or repair the McKenzie siding, that the *only* duty that Respondent's Operating Rules placed on its section foreman for private sidetracks was that of inspection, and that the responsibility for all repairs and maintenance of the McKenzie siding was that of the Turpentine Company which paid for and had the sole authority to start or stop this work.

POINT II.
JURY PROPERLY INSTRUCTED ON EMPLOYMENT ISSUE

In considering whether or not the Trial Court's instruction on the issue of employment was prejudicial, as Petitioner contends, the first inquiry is here addressed to the pri-

mary evidence which establishes "for whom" Petitioner was working at the time he was injured.

There was considerable testimony given by the witnesses for both parties relating to the tools used, normal duties performed and the regular pay of the section crew. While Petitioner's brief has over-emphasized this testimony to the exclusion of other testimony on this issue, it is apparent from an examination of the record that the single over-riding fact on this issue was whether or not Petitioner was told before going to work on the McKenzie siding, that he would be working for the Turpentine Company, and not for Respondent, and that he *voluntarily* agreed to undertake the work in order to make some extra money on his "day off."

The entire evidence on this issue came from the testimony of the members of the section crew who all confirmed the fact that Petitioner, and they, were told that he and they would be working for the Turpentine Company, and not for the Respondent, and that he and they voluntarily agreed to repair the McKenzie siding in order to make some extra money. These facts Petitioner categorically denied at the trial.

This direct conflict between Petitioner's testimony and the testimony of the other witnesses, made a clear issue for the jury—that is, whether to believe Petitioner or his co-workers. This issue was peculiarly a matter within the sole and exclusive province of the jury, and not one on which the Trial Court should or could properly find for employment as a matter of law, as Petitioner contends.

> *Baker* v. *Texas & Pacific R. Co.*, supra, where this Court, quoting from *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 88 L. ed. 520, 525, 64 S. Ct. 409, said:
>
> "The very essence of * * * (the jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

That determination having been made in this case by the jury in favor of the Respondent and against the Petitioner, based on probative facts which amply support that finding, this Court should not re-examine the evidence and reach a conclusion different from that reached by the jury.

Byrne v. *Pennsylvania R. R. Co.*, 262 F. 2d 906 (CA 3, 1959); cert. denied, 359 U. S. 960, 3 L. ed. 2d 766, 79 S. Ct. 798 (1959).

It is axiomatic that if Petitioner in fact was told, before going to work, that he would be working for the Turpentine Company and not for Respondent on that Saturday, and that he voluntarily agreed to help repair the McKenzie siding in order to make some extra money, then he had in fact and law thereby established a "conventional employee-employer" relation with the Turpentine Company to render service for compensation.

Since this evidence would fully determine the question of employment, and inasmuch as the Trial Court charged the jury that Petitioner must have had "actual knowledge" that he was working for the Turpentine Company and not Respondent, before the jury could find for the Respondent on the employment issue, there was no necessity or reason for the Trial Court to consider or give Petitioner's requested instructions 2, 4 and 5. The matters of evidence that the jury would be required to consider under those instructions had, at that point in the trial, no material probative weight or value in determining any issue in the case.

The cases cited in Petitioner's brief in support of his contention on this issue can be readily distinguished, as the facts in each show that either there was no question as to whether the employee was performing an "essential operational activity" of the Railroad, or that the issue was decided under "the loaned servant doctrine," where the evidence showed that the employee had no knowledge or had not

acquiesced in the change of employer, or under "the incident of employment doctrine," where the evidence established that what the employee was doing at the time of injury was a necessary incident of his regular employment.

Under the state of facts peculiar to the McKenzie siding in this case, the Trial Court's instruction to the jury on the issue of employment was both supported by the evidence and legally sufficient, and under it the jury could properly find that Petitioner was not Respondent's employee at the time Petitioner was injured, and that Respondent was not liable for the consequences of such injury.

CONCLUSION

Peitioner has had his day in Court, including a trial by jury under instructions which gave him the benefit of every circumstance on the burden of proof of employment.

The facts in this case and the rationale of the authorities cited in Petitioner's brief compel the same logical conclusion so ably stated by the Court of Appeals in its judgment:

> "Similarly, in the present case, we hold that Atlantic Coast Line was not restrained by law from declining the responsibility of maintaining the McKenzie siding.
>
> * * *
>
> "We therefore conclude that the Sinkler decision does not warrant an abandonment of the conclusion, which we reach on principle and authority, that either there was no duty on appellee to care for this private siding or if there was, it was a duty which appellee could lawfully delegate to others.
>
> "To sum up what we have said in the foregoing discussion, the trial court correctly refused to rule that appellant was injured in the course of employment for appellee, because the appellee's evidence raised an issue of fact on a point which was capable of outweighing all of the

evidence pointing in appellant's favor, and because there was nothing which prevented or rendered illegal an agreement permitting a third party to assume responsibility for this maintenance and repair and to hire anyone, including appellee's regular employees, to discharge this task. Second, (fol. 468) with the issue properly reduced to the factual question whether appellee had or had not hired appellant to do this work, the court committed no reversible error in refusing to submit this issue to the jury's consideration by charging them as to the criteria which are usually applied in determining which of two parties is a given individual's employer at a given moment." (R 175, 177).

The application of the "FELA" decisions cited to the evidence peculiar to this case demonstrates that there is no conflict between those decisions and the judgment of the Court of Appeals under attack, nor has Petitioner shown wherein he has been prejudiced in any of his rights as a litigant. The petition should be dismissed.

Respectfully submitted,

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